Supreme Court, U.S.
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86-933
No.

In The

Supreme Court of the United States

October Term, 1986

CHARLES H. DALE,

Petitioner,

v.

CHICAGO TRIBUNE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. In an age discrimination case, decided below on a summary judgment motion, does the decision conflict with the *Texas Department of Community Affairs v. Burdine,* 450 U.S. 278 (1981) framework and with the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621-634 and the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001-1381 when the district court, in referring to the ADEA, pronounced that

> "It would scarcely be surprising if the employees least adaptable to such a change [a business restructuring] turned out to include a number in the later stages of their careers . . . it is not surprising that the toll of such a reorganization should be heavier among longer-term (and thus older) employees . . . "

and disregarded evidence presented to the court which is favorable to the petitioner, in granting the respondent's summary judgment motion?

2. Does a decision, upholding a motion for summary judgment in an age discrimination case under a *Burdine,* analysis, conflict with *Celotex Corp. v. Catrett,* ___U.S.___, 106 S. Ct. 2548 (1986), which holds that on a motion for summary judgment all evidence in the record is to be considered as support of the movant, when in this case, the evidence introduced by the parties and relied on by the movant, which favored the petitioner, was disregarded when the court below affirmed a summary judgment? Does the granting of the summary judgment also conflict with Anderson v. Liberty Lobby, ___U.S.___, 106 S. Ct. 2505 (1986) by disregarding the substative law of the ADEA?

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PRAYER FOR RELIEF

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit enterea in this proceeding on July 28, 1986; rehearing was denied on October 6, 1986.

OPINIONS BELOW

The decision of the district entered on August 16, 1985, is unreported and is attached as Appendix B.

The Opinion of the Court of Appeals is reported at 797 F.2d 458 (7th Cir. 1986) A copy is set out below as Appendix A. Rehearing was denied on October 6, 1986, and was not reported (Appendix C.).

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the Court of Appeals was entered on July 28, 1985, Appendix A, and a timely petition for rehearing was denied on October 6, 1986, Appendix C.

STATUTORY PROVISIONS INVOLVED

Jurisdiction was invoked under 29 USC §626(c) and (d), 29 USC §216(b), and 28 USC §1337. Plaintiff claimed violation of:

(1) the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621-634, and

(2) the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001-1381.

STATEMENT OF THE CASE

Petitioner Charles H. Dale filed this lawsuit, following the April, 1982, termination of his employment as the Respondent's Purchasing Manager. He asserted violations of: the ADEA, 29 U.S.C. §§621-624; of ERISA, 29 U.S.C. §§1001-1381; and an Illinois common-law duty of good faith and fair dealing. The trial court granted Respondent's motion for summary judgment, concluding that Petitioner failed to make a prima facie case of age discrimination and, alternatively, failed to rebut as pretextual the Respondent's proffered reasons for termination.

Petitioner, the trial court, and the appellate court

relied on the indirect method of proof in discrimination cases, set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and clarified in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 278 (1981). The indirect method of proof requires

> "plaintiff first to prove a prima facie case of discrimination, by showing (1) that he was in the protected class, (2) that he was doing his job well enough to meet his employee's legitimate expectations, (3) that in spite of his performance he was discharged, and (4) that the employer sought a replacement for him. (citations omitted)

La Montagne v. American Convenience Product, Inc. 750 F.2d 1405, 1409 (7th Cir. 1984)

Upon plaintiffs making such a prima facie showing, defendant then may offer legitimate, nondiscriminatory reasons for termination. Plaintiff then has an opportunity to show the proffered reasons to be pretextual.

Further, plaintiff challenged the trial count's interpretation and application of ADEA. The trial court's analysis (Mem.Op., p.16) of the circumstances surrounding the plaintiff's termination, indicated that the court misconstrued the scope and purpose of the ADEA:

> It would scarcely be surprising if the employees least adaptable to such [a reorganization] change turned out to include a number in the later stages of their careers. And a number of those managers might well choose to leave voluntarily rather than contend with the announced - - and of course legitimate - - change of direction. Others might opt to remain but still prove incapable of adhering to the new management plan, in which event their termination or early retirement would properly be perceived as necessary to the overall success of the undertaking. In sum, it is not at all surprising that the toll of such a reorganization should be heaviest among the longer-term (and thus older) employees - - without connoting any ADEA - forbidden motivation.

Petitioner, in opposing a summary judgment motion, relied on evidence introduced into the record by respondent. Yet, the record shows that the court, in considering the summary judgment motion, ignored the evidence favorable to the petitioner, specifically ignoring evaluations by his superiors.

The record before the trial court and the appellate court showed that genuine issues of fact existed as to Dale's job performance. The respondent based its termination of petitioner solely on a series of memoranda from petitioner's supervisor, Cerling, to petitioner. Deposition and documentary evidence presented to the trial court, however, refuted the alleged job deficiencies, thus rendering moot the respondent's claim of inadequate job performance. for example:

1. In October, 1981, and March, 1982, Cerling [Dale's superior] requested an "ethical and standard guidelines to be completed by December 15, 1981. (Dale Dep., Exs. 4, 9).[1] Dale produced the memo, which he had submitted in June, 1981, even before Cerling originally requested it (Doc. 775-79), and a final version, dated December, 1981. (Doc. 479-81). Thus, Dale had already addressed the issue, and even so, he responded to Cerling's additional request. The March, 1982, reference in a Cerling memo is clearly inaccurate. The project had been completed.

2. In his October, 1981, memo (Dale Dep. Ex. 4), Cerling demanded an analysis of the Purchasing Department by December 1, 1981. Dale provided a detailed analysis, on December 1, 1981. (Doc. 212-221). An additional requoted in a garage inventory control and purchasing system plan was also complied with by Dale. (Doc. 482-83).

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[1] The Dale depositions are part of the Record on Appeal. The documents referred to here appear in the record at plaintiff's Appellate Appendix §3.

3. Cerling complained of a "serious problem about Jim Dwadle's furniture that you did not know about." (Dale Dep., Ex. J) Dale presented documents (Doc. 493-94) which indicated he knew the extent of the difficulty and was correcting it.

4. Cerling complained that the telephone book was unsatisfactory, and that Dale had failed to consult with certain individuals. (Dale Dep. Ex. 5). Dale produced a document to Cerling, which responded directly to his criticism, indicating that the individual had been consulted, and that her only concern was the typeface of "i" and "1." (Doc. 502).

5. Cerling's criticisms of the installation of several telephone systems continued throughout all of his memos to Dale. (Dale Dep., Exs. 4,5,7,9). Dale and the Tribune produced numerous documents, in the appellate brief, which refuted Cerling's criticisms. Typical of Cerling's complaints was his claims that Dale failed to plan for the new phone systems. The appendix contains letters, memoranda, and recommendations which indicate extensive planning efforts and communication between Dale, Tribune Company departments, the Tribune's telephone consultant, and Dale's superiors. (Doc. 251-52; 366; 428-29; 389; 382; 233-34; 228-29; 517; Def. Doc. 4).

The Trial court, despite the evidence presented, concluded, Mem. Opn. at 14;

> In short, no *facts* (as contrasted with Dale's own self-evaluation) appear to warrant the conclusion Dale was really meeting the legitimate expectations of his employer - - the prerequisite to a prima facie showing of age discrimination.

The Court of Appeals, in affirming the grant of summary judgment for the employer, choose to ignore the trial court's disregard of this evidence and misinterpretation of the ADEA. In doing so, the Court relied only on evidence favorable to the employer-movant, and thereby failed to apply the other side of this Court's rulings in *Celotex* and

Anderson - - that a respondent as well as a movant on a summary judgment motion is entitled to consideration of the record as a whole, both procedurally and substantively, in considering the motion.

REASONS FOR GRANTING THE WRIT

A writ of certiorari should be granted because of importance: the decision below undermines the purpose of the ADEA and the procedural rules adopted by this Court in *Burdine* to protect the rights afforded to claimants under that Act.

The writ should also be granted because of the conflict of the decision below with the decisions of this Court on summary judgment proceedings in *Celotex* and *Anderson v. Liberty Lobby*, ___ U.S. ___, 106 S.Ct. 2505 (1986).

The Conflict With the ADEA and With the Decision in Burdine

The palpable purpose of the ADEA is to protect the rights acquired by older workers against discrimination in situations including discriminatory reorganization plans. In *Burdine* this Court adopted procedural rules to protect the employee's rights under the Act. The Court below adopted the action of the trial court in referring to the ADEA, as noted above; not being surprised that the results of a reorganization plan would fall on older workers, least able to adaptable to change; or that older managers might leave voluntarily and be terminated rather than contend with such change of direction. The court stated that it was not surprising that the toll would fall most heavily on the longer-term (and thus older) employees without connoting any ADEA-forbidden motivation.

In doing so, the court below affirmed a summary judgment in the face of genuine issues of material fact as to whether the employer's plan was discriminatory, ignor-

ing, *inter alia*, that there was no proof as to any of these issues, or as to why the seventy-some employees on the list produced by defendant who left at unseemly times (*In camera* Exhibit, Rec. #'s 54, 56). The court's disregard of this evidence also thereby undermined the ERISA claim.

Allowing the decision below to stand will result in employers moving for summary judgment and trial courts disregarding the procedural safeguards of *Burdine*.

Conflict With the Summary Judgment Decisions in Celotex and Anderson

The decision below conflicts with this Court's decision in *Celotex Corp. v. Catrett*, ___U.S. ___, 106 S.Ct. 2548 (1986) and on the other hand, produce a conflict between *Celotex* and the *Burdine* line of discrimination cases.

In *Celotex*, 106 S.Ct. at 2552-53, this Court reiterated the standard for summary judgment:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and open motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Further, the Court noted 106 S.Ct. at 2553, that:

> The import of those subsection [Rule 56(a), (b), and (c)] is that regardless of whether the moving party accompanies its summary judgment motion with affadavits, the motion may, and should, be granted so long as whatever is before the district court demonstrates that the stand for the entry of summary judgment, as set forth in Rule 56(c) is satisfied.

In this case, Petitioner presented to the district court a detailed appendix which refuted all charges of incompetence levelled against Petitioner by his supervision. The appendix included documents produced by defendant and plaintiff, as well as excerpts from plaintiff's uncontroverted deposition, which was used by both parties in

and plaintiff, as well as excerpts from plaintiff's uncontroverted deposition, which was used by both parties in briefing the motion for summary judgment.

The trial court, (Mem. opn., p. 14) erroneously labelled the evidence presented by plaintiff as "self-evaluation" choosing to ignore the numerous documents which support plaintiff's claim. Furthermore, plaintiff's deposition remained completely uncontroverted; the defendants made no effort to rebut plaintiff's statements and, in fact, relied on them extensively.

The record as a whole showed the existence of disputed facts as to the petitioners job performance, thus defeating the respondent's motion for summary judgment. As this court stated in *Anderson v. Liberty Lobby*, ___ U.S.___, 106 S.Ct. 2505, 2510 (1986):

> "[i]t is true that the issue of material fact required by Rule 56(c) to be presented to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." (quoting *First National Bank of Arizona v. Cities Service Co.*, 391 US 253, 288-89 (1968).

If the decision below is allowed to stand, the consequences to other litigants in age discrimination cases will be to deny them rights protected by the ADEA because of a misapplication of the procedural rules of *Burdine*. In cases where employees are not prepared to file cross motions for summary judgment, and an employer files such a motion, incorporating the employee's entire employment history, the employee will be permitted to rely only on the portion that is not favorable to him. This conflicts with *Celotex* and *Anderson*, negates the purpose of the *Burdine* rules, and denies the employee due process of law.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiocari be granted and that this cause be remanded for further proceeding consistent with both the *Burdine* and *Celotex-Anderson* lines of this Court's decision.

Respectfully Submitted,

December 5, 1986

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-2577

CHARLES DALE,

Plaintiff-Appellant,

v.

CHICAGO TRIBUNE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84-C-3100—**Milton I. Shadur**, *Judge.*

ARGUED APRIL 16, 1986—DECIDED JULY 28, 1986

Before WOOD and COFFEY, *Circuit Judges*, and NOLAND, *District Judge.**

NOLAND, *District Judge.* The primary question raised by this appeal is whether the Chicago Tribune ("Tribune") violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-634 (1982), in terminating Charles Dale ("Dale"), the plaintiff-appellant in this case. In addition to this claim, Dale alleges that his termination violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1381 (1982), and an Illi-

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* The Honorable James E. Noland, Chief District Judge for the Southern District of Indiana, is sitting by designation.

nois common law duty of good faith and fair dealing. Dale also filed a motion to add a named party plaintiff to the action pursuant to the representative action provision of the ADEA, 29 U.S.C. § 626(b) (1982). The district court granted the Tribune's motion for summary judgment, Fed. R. Civ. P. 56, on all counts and dismissed Dale's motion to add a named party plaintiff as moot. On appeal, the Tribune requested this Court to impose sanctions upon Dale, pursuant to Rule 11 of the Federal Rules of Civil Procedure, because of the alleged speciousness of Dale's Illinois common law claim. For the reasons stated below, we affirm the judgment of the district court and decline the Tribune's invitation to impose sanctions upon Dale.

I. FACTS

Summary judgment is appropriate when there exists "no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, a court must construe the facts alleged in a light most favorable to the party opposing the motion for summary judgment. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed.2d 176 (1962) (*per curiam*); *Hermes v. Hein*, 742 F.2d 350, 353 (7th Cir. 1984). Accordingly, the facts, for the purposes of this appeal, are as follows.

Dale was hired as a copywriter by the Tribune in 1956, and was eventually promoted to become manager of the Creative Services Department where he supervised sixty employees. In 1975, the Creative Services and Promotion Departments were merged upon Dale's recommendation, and Dale became the assistant manager of the new entity, entitled the "Creative Division."

Three years later, Tribune President Robert Hunt ("Hunt") and Dale reviewed the operations of the Creative Division and opined that the merger was not achieving its potential because the departments had not been functionally merged, thus the Division had an excessive number of

managers. Later in that same meeting, Hunt asked Dale whether Dale was interested in becoming the Tribune's Purchasing Manager. Dale expressed his interest and formally accepted the position after some discussions with General Manager Harold Lifvendahl ("Lifvendahl"). Lifvendahl believed that the Purchasing Department had serious personnel problems and was not professionally operated. Previously, the Purchasing Manager had reported to Building Manager Bruce Cerling ("Cerling"), but Lifvendahl directed Dale to report directly to the General Manager (Lifvendahl). Dale had no prior purchasing experience notwithstanding his general managerial experience, and his appointment to the position was a lateral move with no concomitant increase in compensation.

Once settled in his new position, Dale participated in a three-day purchasing workshop and joined the Chicago Purchasing Managers Group. Within one year of assuming his new position, his department obtained responsibility for newsprint traffic, travel planning and telephone operations. Dale continued to report to Lifvendahl until Lifvendahl was transferred to Florida. Dale reported to Lifvendahl's replacement, Thomas O'Donnell ("O'Donnell"), for five months, until O'Donnell directed Dale to report to Cerling instead. Dale expressed his reservations about this change because Lifvendahl had brought Dale into the Purchasing Department to rectify the "serious personnel problems" that had existed under Cerling's supervision.

In 1981, Charles Brumback ("Brumback") became the new President of the Tribune. Brumback initiated an overall program to reduce costs and maximize profits by implementing cost and personnel reductions, and undertaking cost-saving equipment improvements. Brumback made substantial changes in the Tribune's management philosophy which were reflected in Dale's deposition:

> [The existing management team was] a long, long time Tribune group. We knew one another. We worked up through the ranks together. And I think we worked well together, all with problems. You are never without problems or personality problems.

> But we pretty well knew how the other person operated, and tried to work within the system. I do not think Mr. Brumback wanted that kind of a system. I think he wanted to bring in a different kind of Management Team.
>
> And I think he would have called it, quote, a modern Management Team, one that is attuned to innovation, to new ideas, change.
>
> And, this is an opinion, I believe Mr. Brumback did not think the Management Team at the Tribune was capable of doing this. I believe he was wrong.

Deposition 1, Charles Dale, Aug. 30, 1984, p. 96.

Dale's performance began to be criticized by Brumback soon after Brumback became Tribune President. On August 31, 1981, Dale reflected this in a letter of Lifvendahl:

> The problem in brief, is that I think Brumback is setting the groundwork for my termination. It may come two weeks from now, or two months, but I think he's getting me programmed.
>
> It's too long to go into all the detail, other than he's given me a major going over on everything he's questioned me about—and the things he's picked on have been minor and basically have been matters of opinion. He seems to be doing this to a whole clutch of Tribune executives and managers: things we've done in the past, are proposing now, or have planned for the future are archaic and disorganized according to his lights.

Appellant's Appendix on Appeal, § 3, p. 797. Although Dale was unable to recall the nature of Brumback's criticisms with specificity in his deposition approximately three years later, Dale did indicate that some of the criticisms involved significant issues. Deposition 2, Charles Dale, Nov. 12, 1984, pp. 66-67.

On October 5, 1981, Cerling assigned Dale a number of projects designed to rectify deficiencies that Cerling perceived in Dale's performance as Purchasing Manager.

Deposition 2, Charles Dale, Nov. 12, 1984, p. 79. The items included on the list involved matters of basic purchasing operation, many of which had either been discussed or initiated prior to the time Cerling assumed supervisory control of the Department.

On November 18, 1981, Cerling prefaced a memorandum to Dale with the following:

> On October 5, we had a meeting at which I gave you a number of projects to be completed with dates (attached).
>
> I thought it would be helpful if I documented other conversations and my concerns.
>
> Since acquiring responsibilities of Purchasing and Telephone, I have observed a lack of fundamental management techniques; these are, poor organization, planning, control, leadership, direction and knowledge.

Appellant's Appendix on Appeal, § 2, p. 780. The memorandum went on to list specific examples of Dale's deficiencies, focusing on his installation of a new cost-saving telephone system. Among the particular criticisms were a failure to plan adequate space; a lack of adequate consultation with the appropriate Tribune Departments; errors in the instruction manual and directory; a lack of an adequate new-employee training program; and a failure to provide for a transfer of night calls. In his deposition, Dale acknowledged the existence, but not the gravity of these problems. Deposition 2, Charles Dale, Nov. 12, 1984, pp. 106-32.

The November 18 memorandum also criticized Dale's inability to use the several computer systems employed by the Purchasing Department, as well as Dale's failure to become a "professional purchasing person" with his own "buying subjects." In essence, Dale answered these criticisms by reasoning that in his opinion it was neither efficient nor necessary for a manager to become proficient in these areas. Deposition 2, Charles Dale, Nov. 12, 1984, pp. 136-37.

In December of 1981, Cerling sent Dale a third critical memorandum detailing a number of Dale's failings as a supervisor in the Purchasing Department. Dale countered that these criticisms were either unwarranted or premature. Deposition 2, Charles Dale, Nov. 12, 1984, pp. 145-53. Finally, a similar Cerling memorandum in March of 1982 chided Dale for his failure to rectify the previously cited criticisms as well as pointing out several new examples of Dale's poor management skills. Dale acknowledged the problems listed in the March 3 memorandum, but placed the blame for those problems upon others in the Tribune organization. Deposition 3, Charles Dale, Dec. 18, 1984, pp. 5-37.

Approximately one month later, Brumback summoned Dale into his office and terminated his employment because of his failure to function efficiently as Purchasing Manager. Dale was given the option of accepting immediate termination with severance pay, or volunteering for "early retirement" upon his fifty-fifth birthday in July. Dale selected the latter.

On December 22, 1982, Dale filed an age discrimination complaint with the Equal Employment Opportunity Commission ("EEOC") identifying the Tribune as the charged party. Dale received a right to sue letter on June 17, 1983. On April 11, 1984, Dale commenced this action in the district court by filing the aforementioned three-count complaint. The district court granted the Tribune's motion for summary judgment on all three counts and dismissed Dale's motion to add a named party plaintiff as moot.

II. DISCUSSION

A. *ADEA Count*

In an age discrimination suit, the burden of persuading the trial court that the defendant discriminated against the plaintiff remains with the plaintiff at all times. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1011 (1st Cir. 1979); *see Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 1093, 67 L. Ed.2d 207

(1981). The plaintiff can carry this burden directly by presenting direct or circumstantial evidence that he was discharged because of his age. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, ____, 105 S. Ct. 613, 622, 83 L. Ed.2d 523 (1985); *Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59, 63 (7th Cir. 1986); *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984).

If, as in this case, the plaintiff presents no direct evidence of age discrimination, the shifting burdens set forth by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed.2d 207 (1981),[1] provide an indirect method of proof. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984). Pursuant to that framework, a plaintiff carries the initial burden of establishing a *prima facie* case of age discrimination. Once a *prima facie* case has been established, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the discharge. If the employer carries this burden, then, the employee must prove by a preponderance of the evidence that the employer's explanation was a mere pretext for discrimination. *Burdine*, 450 U.S. at 252-53, 101 S. Ct. at 1093; *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985).

In order to establish a *prima facie* case under the ADEA, a plaintiff must show (1) that he belongs to the protected class, (2) that his job performance was sufficient to meet his employer's legitimate expectations, (3) that

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[1] *McDonnell Douglas*—a race discrimination case—and *Burdine*—a sex discrimination case—were brought under Title VII of the Civil Rights Act of 1964. It is accepted now that the general shifting burden framework is applicable to age discrimination suits under the ADEA. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, ____, 105 S. Ct. 613, 620-23, 83 L. Ed.2d 523 (1985); *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985).

he was discharged in spite of his performance, and (4) that the employer sought a replacement for him. *Matthews v. Allis-Chalmers*, 769 F.2d 1215, 1217 (7th Cir. 1985); *La Montagne*, 750 F.2d at 1409 (7th Cir. 1984).[2]

There is a substantial question in this case whether, on the record before this Court, Dale has established a *prima facie* case. Dale's age clearly places him within the parameters of the protected class. In addition, although no mention of a replacement for Dale appeared in the briefs or the record, this Court will assume that the Tribune sought a replacement. Thus, the crucial issue in Dale's *prima facie* case is whether he can establish, by a preponderance of the evidence, that his job performance satisfied the legitimate expectations of the Tribune. *Huhn v. Koehring*, 718 F.2d 239, 244 (7th Cir. 1983). This factor envisions a bifurcated inquiry, *i.e.*, whether the employer's expectations were legitimate and if so, whether the employee was meeting those expectations. Although the inquiry into whether the employer's expectations were legitimate is a limited one, *id.* (quoting *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)), the court must determine whether the employer communicated those expectations to the employee and whether those expectations were unreasonable. *Id.*[3] In this appeal, the record clearly es-

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[2] This four part test was first set forth in *McDonnell Douglas*, 411 U.S. at 802, 93 S. Ct. at 1824. That case involved discrimination in hiring, thus, the substantive standard employed by factors (2) and (3) of the above *prima facie* test was the qualification of the applicant. In order to tailor these factors to address a potential ADEA discharge, the *Loeb* court substituted for an applicant's qualifications, the standard used by an employer to measure an existing employee's "qualifications," *i.e.*, job performance. *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979). This adaptation has been adopted by this Circuit. *See Allis-Chalmers*, 769 F.2d at 1217; *La Montagne*, 750 F.2d at 1409; *Huhn v. Koehring*, 718 F.2d 239, 243 (7th Cir. 1983).

[3] This inquiry is necessitated by the potentiality of an employer imposing impossible conditions upon an employee in order to create

(Footnote continued on following page)

tablishes that the Tribune communicated its expectations to Dale long before he was terminated. Furthermore, the multiple memorandums of Cerling and the criticisms of Brumback indicate that Dale's performance was not satisfying their expectations.[4]

The record also demonstrates that Dale has failed to carry his burden of clearly establishing that the Tribune's expectations were unreasonable. There is a complete absence of any showing in the record that Dale's workload

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[3] *continued*
a pretext for terminating the employee because of his age. Under those circumstances, an employee will be unable to establish a *prima facie* case because he will be unable to establish that he satisfied his employer's expectations. This in turn will bar the plaintiff from ever establishing that the employer's explanation is a pretext for unlawful age discrimination. In order to balance the admonitions of the *Kephart* and *Huhn* cases with this contingency, this Court is required to conduct only a cursory examination into the reasonableness of the employer's expectations.

[4] The standard used to determine whether an employee has carried this *prima facie* burden is quite clear:

> Plaintiff in essence, to establish a prima facie case must eliminate the most obvious legitimate reasons for the employer's actions—plaintiff's lack of qualification or the employer's lack of need—to establish that the employer was motivated by an illegitimate reason. This method of proving plaintiff's case in chief is available to those claiming age discrimination as well as any other type of discrimination.

Monroe v. United Airlines, Inc., 736 F.2d 394, 403 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1356 (1985); *See also Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 2949-50, 57 L. Ed.2d 957 (1978); *La Montagne*, 750 F.2d at 1410; *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 979 (7th Cir. 1984).

The most obvious legitimate reason for the discharge of an employee is that the employee's inadequate job performance necessitated his termination. In the instant case, Dale was warned that his job performance was inadequate and was subsequently terminated for that very reason. Thus, pursuant to the framework established in the *Furnco* line of cases cited *supra*, Dale must eliminate inadequate performance as the reason for his discharge in order to establish a *prima facie* case. Dale has not done this.

was excessive, that his assignments were unachievable, or that the demands placed upon him were unreasonable. As a result, Dale has failed to state a *prima facie* case of age discrimination under the ADEA. *Huhn v. Koehring*, 718 F.2d 239, 244-45 (7th Cir. 1983).

Assuming, *arguendo*, that Dale could carry this initial burden, a rebuttable presumption of discrimination arises and the burden shifts to the Tribune to articulate a legitimate non-discriminatory reason for the discharge. This burden, however, is merely a burden of production, *Burdine*, 450 U.S. at 255-58, 101 S. Ct. at 1094-96, *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 (2d Cir. 1984), *Loeb*, 600 F.2d at 1011, that is not difficult to satisfy.[5] In this case, the record demonstrates that the Tribune terminated Dale because it no longer viewed Dale as qualified to fulfill his obligations as Purchasing Manager. This explanation satisfies the Tribune's burden of production, *Haskell v. Kaman Corp.*, 743 F.2d 113, 119 n.1 (2d Cir. 1984), *Mantione v. Ted Bates Advertising*, 38 Fair Empl. Prac. Cas. (BNA) 1457, 1461 (S.D.N.Y. 1985), and the presumption of discrimination is therefore rebutted. *See Burdine*, 450 U.S. at 255, 101 S. Ct. at 1094; *La Montagne*, 750 F.2d at 1409.

The burden now shifts back to Dale to prove that the Tribune's articulated reasons are a pretext by showing that the employer's explanation is unworthy of credence or that it is more likely that a discriminatory reason motivated the employer's actions. *See Burdine*, 450 U.S. at 253-56, 101 S. Ct. at 1093-95; *La Montagne*, 750 F.2d at 1409.[6] In order to carry this burden the plaintiff must

[5] The Supreme Court set forth a standard to analyze this burden in the *Burdine* case. "The defendant need not persuade the court that it was actually motivated by the proffered reasons. . . . It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Burdine*, 450 U.S. at 254-55, 101 S. Ct. at 1094 (citations omitted).

[6] At this point, the employee is given the opportunity to prove that his employer's unreasonable performance expectations were a pretext for age discrimination.

establish that he was discharged because of his age. *Golomb v. Prudential Insurance Co. of America*, 688 F.2d 547, 550 (7th Cir. 1982); 29 U.S.C. § 623(a).[7] Dale need not prove that age was the only factor motivating his discharge, but he must prove that age was "a determining factor," *Smith v. Flax*, 618 F.2d 1062, 1066 (4th Cir. 1980), *Loeb*, 600 F.2d at 1011-12, "in the sense that he would not have been discharged 'but for' his employer's motive to discriminate against him because of his age." *La Montagne*, 750 F.2d at 1049.

In order to rebut the Tribune's proffered explanation, Dale must refute the Tribune's specific explanations. *See Christie v. Foremost Insurance Co.*, 785 F.2d 584, 586 (7th Cir. 1986); *La Montagne*, 750 F.2d at 1414. On at least five occasions during an eight month period from 1981 to 1982, Dale's job performance was criticized by his superiors. In his October 5, 1981, memorandum, Cerling provided Dale with a specific list of projects and their projected completion dates. In a follow-up memorandum on November 18, 1981, Cerling criticized Dale's fundamental management abilities and indicated his dissatisfaction with Dale's performance regarding the October 5, 1981, items. Dale received similar memoranda specifically criticizing his performance from Cerling in December and March.

Dale can point to nothing in the record, besides his own perceptions, to support his assertion that his performance was adequate. Neither positive evaluations from his personnel file, nor statements of independent third parties to the effect that his performance as Purchasing Manager was adequate, were submitted by Dale. Instead, Dale relies

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[7] Section 623(a) of the ADEA provides the following:

> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hear or to discharge any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age.

29 U.S.C. § 623(a) (1982) (emphasis added).

exclusively on his own depositions, 356 pages in length, to rebut the criticisms of his superiors. Throughout his depositions, Dale's rebuttal consists entirely of assertions either that in his mind his performance was adequate, or that the skills Cerling required of him were unnecessary for a Purchasing Manager.

This Court will not, however, delve into the question of which portrayal is the correct one. *See Allis-Chalmers*, 769 F.2d at 1218-19. This Court does not sit as a super-personnel department that reexamines an entity's business decisions. *See Huhn*, 718 F.2d at 244 (quoting *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981)). The question is not whether the Tribune exercised prudent business judgment, *id.*, but whether Dale has come forward to refute the articulated, legitimate reasons for his discharge. In this regard, Dale must do more than challenge the judgment of his superiors through his own self-interested assertions. *Id.* "[The employee's] perception of himself, however, is not relevant. It is the perception of the decision maker which is relevant." *Smith v. Flax*, 618 F.2d 1062, 1067 (4th Cir. 1980). Dale has not made a sufficient showing to contradict his superior's negative assessments of him.[8]

Furthermore, as discussed above, Dale must establish a nexus between his evidence and age discrimination in that "but for" his age, he would not have been termi-

[8] Summary judgment is the proper method to test the evidence in order to preempt trial. "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Fed. R. Civ. P. 56 advisory committee note. "[Dale] should not be allowed to proceed with a case on the mere hope that trial would produce evidence he was unable to garner at the stage of summary judgment." *Parker v. Federal National Mortgage Association*, 741 F.2d 975, 980 (7th Cir. 1984).

nated.[9] The only other material submitted by Dale relating to this issue was an *in camera* exhibit that listed seventy-seven Tribune management employees aged forty to seventy who left the employment of the Tribune from 1982 to 1984 (hereinafter "the seventy-seven"). This "statistical evidence," however, is riddled with defects. Included on the list are all ADEA class Tribune management employees who left the employment of the Tribune for any reason, including death, transfer, promotion, disability, voluntary retirement, voluntary resignation, and involuntary termination. Of the seventy-seven employees on the list, thirteen either died, were promoted, were transferred, or suffered a long term disability. Of the remaining sixty-four, approximately twenty were sixty-two or older and the reason for their termination was listed as *voluntary* retirement. Of the remaining forty-four employees, only eighteen, including Dale, were listed as having been terminated involuntarily. Dale has made no showing that any of these terminations were unjustified. Moreover, Dale has not provided this Court with the total number of ADEA class managers that worked at the Tribune during the years in question, or the number of such managers that remained on the payroll in spite of the alleged "age discrimination."[10] Furthermore, nothing in the record indicates that these seventy-seven terminations

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[9] In support of his position, Dale infers that Cerling harbored a personal vendetta against him because of events that transpired in the past. This personal animosity, however, has no bearing on whether age was a determining factor in Dale's termination. "Personality conflicts alone cannot support a basis for an ADEA claim." *Ackerman v. Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982); *Graefenhain v. Pabst Brewing Co.*, 620 F. Supp. 696, 703 (E.D. Wis. 1985). Furthermore, at the time of Dale's discharge, Cerling and Brumback were the same age as Dale, fifty-four years old.

[10] The Tribune employs more than 4,000 persons, thus, it is likely that a significant percentage of this number, during the relevant time period, was made up of management employees between ages forty and seventy.

constituted an abnormal shift in the number of terminations of ADEA class management employees.[11] This Court concludes that for these reasons this statistical evidence lacks sufficient probative value to rebut the Tribune's proffered explanation for Dale's discharge. *See Parker v. Federal National Mortgage Association*, 741 F.2d 975, 980 (7th Cir. 1984).

In summary, Dale's self-interested, conclusory assertions of discrimination when combined with his dubious statistical evidence are not adequate to rebut the Tribune's proffered explanation for Dale's discharge, namely, poor job performance.

B. *ERISA Count*

The district court construed Count II of Dale's Complaint to allege that the Tribune's discharge of him violated sections 510[12] and 502[13] of ERISA. Although these

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[11] It is important to note that Brumback was instituting a new management philosophy at the Tribune. Thus, a higher turnover of long-term Tribune employees, entrenched in established practices, might have been expected had a more complete record borne that out. The desire to establish a new management philosophy by assembling a new management team that displaces older employees does not *ipso facto* constitute ADEA discrimination. *See La Montagne*, 750 F.2d at 1413; *Kephart*, 630 F.2d at 1224.

[12] Section 510 of the ERISA has been codified and provides in pertinent part:

> It shall be unlawful for any person to *discharge*, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C. § 301 *et seq.*], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

29 U.S.C. § 1140 (1982) (emphasis added).

[13] Section 502 of the ERISA has been codified and provides in pertinent part:

(Footnote continued on following page)

sections provide that an aggrieved party may file a civil action to redress alleged ERISA violations, they do not state whether exhaustion of administrative remedies is a precondition to filing that action. The rule in this Circuit is clear. The application of the administrative exhaustion requirement in an ERISA case is committed to the sound discretion of the district court. *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983); *Lieske v. Morlock*, 570 F. Supp. 1426, 1429 (N.D. Ill. 1983). A decision committed to the sound discretion of the district court can be disturbed on appeal only if there has been a clear abuse of discretion. *Kross*, 701 F.2d at 1244; *Medina v. Castillo*, 627 F.2d 972, 974-75 (9th Cir. 1980).

The district court, in exercising its sound discretion on this issue, applied the exhaustion doctrine to this case. Dale does not contest the fact that he failed to exhaust his administrative remedies prior to filing the instant suit. Rather, Dale argues that one of the recognized exceptions to the exhaustion doctrine, futility,[14] is applicable to his

[13] *continued*

A civil action may be brought:

(1) by a participant or beneficiary—

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

. . .

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of this plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or their terms of the plan;

29 U.S.C. § 1132 (1982).

[14] *Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980). Other exceptions to the exhaustion doctrine that have been recognized by some courts include inadequacy of the administrative remedy, *id.*, and wrongful denial of access to internal administrative procedures. *See Lucas v. Warner & Swasey Co.*, 475 F. Supp. 1071 (E.D. Pa. 1979). Only the futility exception has been raised by Dale in this appeal.

case because a single individual was responsible for discharge policies and ERISA benefit claims at the Tribune, namely the Tribune Personnel Director.

First, the record clearly establishes that the Tribune extensively argued the issue of Dale's failure to exhaust his administrative remedies in its motion for summary judgment. The Tribune's contention on appeal, that Dale neither countered the exhaustion argument nor raised the ERISA issue in his opposition to summary judgment, is borne out by the record.[15] Because Dale failed to raise these issues at the trial court level, he is barred from arguing them on appeal.

> It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. If it does not do so, and loses the motion, it cannot raise such reasons on appeal.

Liberles v. County of Cook, 709 F.2d 1122, 1126 (7th Cir. 1983).

Secondly, although the invocation of this doctrine can render harsh results, a closer examination of the merits of the underlying ERISA claim reveal that it does not work an injustice in this case. Assuming, *arguendo*, that Dale had raised these claims at the trial court level, there is nothing in the record to indicate that exhaustion in this instance was an exercise in futility. The fact that the defendant is in charge of both discharges and ERISA benefit administration does not alone constitute futility. *See Kross*, 701 F.2d at 1245. Similarly, the absence of a "neutral arbitrator" in the administration of the initial ERISA pro-

[15] In his reply brief to this Court, Dale argues that he raised the ERISA issue in a footnote in his memorandum in opposition to summary judgment. Dale's memorandum contained seven footnotes and the single reference to ERISA was in a footnote that addressed the propriety of "notice" pursuant to Rule 23 class actions. Fed. R. Civ. P. 23.

cedures does not, by itself, render the exhaustion of such procedures futile. *Amato v. Bernard*, 618 F.2d 559, 569 (9th Cir. 1980).

C. *Illinois Common Law Claim*

The ERISA analysis discussed above is equally applicable to Dale's Illinois common law claim. Dale argues on appeal that although his contract with the Tribune was at-will, the Tribune owed him an implied duty of good faith and fair dealing, which it breached when it terminated him. Again, the Tribune argued this issue in its motion for summary judgment and Dale did not counter these arguments in his motion in opposition. Accordingly, Dale is barred from raising these arguments to this Court on appeal.

Moreover, the substantive merits of Dale's position on this issue are also fatally flawed. In order to obtain relief on this count, Dale asks this Court to anticipate upcoming changes in the Illinois state law. The most recent Illinois case cited by either party that addresses the issue of an implied duty of good faith and fair dealing in a case not involving a retaliatory discharge, summarized the present Illinois law as follows:

> Care must be taken to prevent the transmutation of every breach of contract into an independent tort action through the bootstrapping of the general contract principle of good faith and fair dealing. We conclude that existing principles of tort law are adequate without our creating a new action based on a vague notion of fair dealing. A general "bad faith" tort based on breach of contract would undoubtedly be difficult to apply in most cases and superfluous in cases such as the present one, which primarily sounds in contract.

Martin v. Federal Life Insurance Co., 109 Ill. App.3d 596, 607, 440 N.E.2d 998, 1006 (1st Dist. 1982). Dale has not

convinced this Court that any change is forthcoming in this area of the Illinois law.[16]

D. *Dale's Motion to Add a Party Plaintiff*

On July 10, 1985, subsequent to the filing of the Tribune's motion for summary judgment, Dale filed a motion to add a named party plaintiff, John Hanneman, to his ADEA claim pursuant to the representative action provision of the ADEA. 29 U.S.C. § 626(b) (1982). Because the district court granted the Tribune's motion for summary judgment, it dismissed Dale's motion as moot. Having affirmed the district court's entry of summary judgment on all counts, this Court similarly concludes that Dale retains no viable ADEA claim to which a named party plaintiff may be added. Therefore, Dale's motion to add a named party plaintiff is rendered moot and dismissed.

III. CONCLUSION

The district court's entry of summary judgment on all counts in favor of the defendant, and its dismissal of the plaintiff's motion to add a named party plaintiff, are affirmed. The defendant's motion to impose sanctions upon Dale is denied.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[16] On the final page of legal argument in the Tribune's brief to this Court, the Tribune requested, for the first time, that sanctions be imposed against Dale because his Illinois common law claim "was not warranted." This Court concludes that Dale's common law claim possessed sufficient merit to withstand such a request. Accordingly, the Tribune's motion is denied.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

CHARLES DALE,
Plaintiff,

v.

CHICAGO TRIBUNE COMPANY,
Defendant.

No. 84 C 3100

MEMORANDUM OPINION AND ORDER

Charles Dale ("Dale") has filed a three-count Complaint against the Chicago Tribune Company ("Tribune"), asserting violations of (1) the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621-634, (2) the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001-1381, and (3) an Illinois common-law duty of good faith and fair dealing. Dale's claims stem from termination of his employment as Tribune's Purchasing Manager in April 1982.

Tribune now moves for summary judgment under Fed. R. Civ. P. ("Rule") 56. In addition to responding to that motion, Dale's counsel seeks to expand the scope of this action by adding a named party plaintiff under the representative action provision of ADEA, 29 U.S.C. §626(b). For the reasons stated in this memorandum opinion and order, Tribune's Rule 56 motion is granted and Dale's motion to add a named party plaintiff is accordingly dismissed as moot.

Facts[1]

Dale began working for Tribune as a copywriter in 1956. He held a succession of positions (leading to the department managership beginning in 1963) in the Art and Copy Department, later renamed the Creative Service Department. In 1975 Dale recommended to Tribune President Robert Hunt ("Hunt") that the Creative Services Department and the Promotions Department be merged to increase efficiency. Hunt accepted the recommendation, and Dale became assistant manager of the new entity, known as the Creative Division.

Three years later Dale met again with Hunt and reported the merger was not yielding the expected benefits because the two pre-existing departments had not been functionally merged and because there were too many managers. During the course of that meeting Hunt asked whether Dale had any interest in becoming Tribune's Purchasing Manager. Dale said he was interested in the change, and following discussions with General Manager Harold Lifvendahl ("Lifvendahl") he accepted the position. Though the Purchasing Manager had previously reported to Building Manager Bruce Cerling ("Cerling"), Dale was directed to report to Lifvendahl and to address himself to what Lifvendahl saw as serious personnel problems in the Purchasing Department. Dale's shift into Purchasing–a field in which he had no prior experience or training apart from his general managerial experience–was considered a lateral move involving no increase in compensation.

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[1] Rule 56 imposes on the party moving for summary judgment the burden of establishing the lack of a genuine issue of material fact. *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984). For that purpose the court must, in viewing the evidence, draw all reasonable inferences in the light most favorable to the nonmovant–here Dale. *Hermes v. Hein*, 742 F.2d 350, 353 (7th Cir. 1984). Throughout this opinion the recitals of facts adhere to those principles.

During his first months in the new position Dale participated in a three-day workshop on purchasing. He also joined the Chicago Purchasing Managers Group. Within a year of Dale's becoming Purchasing Manager, responsibility for newsprint traffic, travel planning and telephone operations were transferred to the Purchasing Department.

Throughout that period Dale continued to report to Lifvendahl, but in February 1981 Lifvendahl moved to become president of a Tribune newspaper in Florida. Thomas O'Donnell ("O'Donnell") replaced him as General Manager. For some five months Dale then reported to O'Donnell, but in June 1981 O'Donnell asked Dale to report to Cerling instead. O'Donnell said there had been too many people reporting to him, so he had to reorganize the administrative structure to make his own responsibilities manageable. Dale was apprehensive about the change because Cerling had been supervising the Purchasing Department before 1978, when Lifvendahl brought Dale in to address the serious personnel problems. Nevertheless Dale accepted the organizational change.

Those shifts in managerial structure coincided with the first several months of the tenure of Charles Brumback ("Brumback") as Tribune President. Brumback began an overall effort to reduce Tribune costs and increase corporate profits. Department heads had to commit themselves to cost and personnel reductions to meet budget reduction goals, and cost-saving equipment improvements were undertaken. In short Brumback began to make substantial changes in Tribune's management philosophy. As Dale described the change (Dale Dep. I-96):

> [The existing management team was] a long, long time Tribune group. We knew one another. We worked up through the ranks together. And I think we worked well together, all with problems. You are never without problems or personality problems.
>
> But we pretty well knew how the other person

> operated, and tried to work within the system. I do not think Mr. Brumback wanted that kind of a system. I think he wanted to bring in a different kind of Management Team.
>
> And I think he would have called it, quote, a modern Management Team, one that is attuned to innovation, to new ideas, change.
>
> And, this is an opinion, I believe Mr. Brumback did not think the Management Team at the Tribune was capable of doing this. I believe he was wrong.

Dale's difficulties began soon after Brumback became Tribune President. *Before August 1981 Brumback had apparently pressed Dale more than once as to his performance.* On August 31 Dale wrote to Lifvendahl (Dale Dep. Ex. 3):

> The problem in brief, is that I think Brumback is setting the groundwork for my termination. It may come two weeks from now, or two months, but I think he's getting me programmed.
>
> It's too long to go into all the detail, other than he's given me a major going over on everything he's questioned me about - - and the things he's picked on have been minor and basically have been matters of opinion. He seems to be doing this to a whole clutch of Tribune executives and managers: things we've done in the past, are proposing now, or have planned for the future are archaic and disorganized according to his lights.

When deposed three years later Dale was unable to remember the specific nature of Brumback's criticisms, noting only that Brumback was upset because Dale did not know the difference in height between a computer table and a typewriter table (Dale Dep. II-66). Dale stressed however that he would not have written to Livfendahl as he did had that been the extent of Brumback's criticism (Dale Dep. II-66-67).

On October 5, 1981 Cerling prepared a list of projects he expected Dale to complete in the upcoming months. Dale testified (Dale Dep. II-79) the list was accompanied

by a letter indicating the projects were designed to remedy deficiencies Cerling perceived in Dale's performance as Purchasing Manager. All items on the list dealt with the basic purchasing operation: They included such things as preparing a purchasing manual, drafting ethical guidelines for buyers, scheduling regular staff meetings and developing a recordkeeping system, through computerization, to enable management to make informed decisions. Dale said in his deposition (Dale Dep. II-83-106) a number of those projects had been discussed and even initiated before Cerling assumed supervisory control, *but few had been carried to fruition and none of the matters in issue had been routinely handled in a fashion satisfactory to Cerling.*

On November 18, 1981 Cerling sent Dale a memorandum (Dale Dep. Ex. 5) beginning:

> On October 5, we had a meeting at which I gave you a number of projects to be completed with dates (attached).
>
> I thought it would be helpful if I documented other conversations and my concerns.
>
> Since acquiring responsibilities of Purchasing and Telephone, I have observed a lack of fundamental management techniques; these are, poor organization, planning, control, leadership, direction and knowledge.

Next the memorandum proceeded to list particular examples of Dale's shortcomings, focusing on his handling of the installation of a new telephone system designed to reduce substantially Tribune's telephone costs. Among the matters Cerling criticized were a failure to plan adequately for the space requirements of the new system; a failure to consult adequately with the various Tribune departments in order to determine their telephone needs; errors in the instruction manual and directory; a lack of plans for training new employees in the use of the system; and a failure to follow through on plans for the handling of night calls. Again Dale acknowledged the existence of the problems detailed in the memorandum, though he denied they were

as serious as Cerling portrayed them to be (Dale Dep. II-106-32).

In addition, the November 18 memorandum criticized Dale for his lack of specific familiarity with the several computer systems under his management and repeated a number of the criticisms set out in the October 5 list. Dale's deposition testimony responded to the criticism about his lack of computer expertise with an analogy (Dale Dep. II-136):

> I can type, but that doesn't mean that I as a manager should necessarily know how to use a typewriter.

Similarly, answering Cerling's charge Dale had "not become a professional purchasing person" and had no "buying subjects," Dale said (Dale Dep. II, 136-37):

> I believe a manager -- let's put it this way, I believe if you take on a number of assignments it -- that can be better done by other people [, y]ou're not utilizing your talents or to the best of your ability. If I were to take up my day actively purchasing, would this detract from my management responsibilities; and also remember the time this was being done, we had two major systems coming on board. I was in meetings. I had all sorts of things going on. If a person in Production, Editorial needed a rush item, I'm not at my desk, it's delayed.

On December 14, 1981 Cerling sent Dale a third memorandum (Dale Dep. Ex. 7) detailing a number of specific failings on Dale's part in the conduct of his department. Dale believed a number of those charges may have been either unwarranted or premature (Dale Dep. II-145-53). For example the December 14 memorandum contained the following item:

> The Rohm (sic -- should be Rolm) installation shows the same lack of planning that you have demonstrated on other projects.
>
> a. The meeting to firm up the installation was on 12/8. You promised installation and turn-

> over during the holidays -- this will be very difficult.

But Dale Dep. II-147 says the telephone system in question was in fact installed over the holidays.

For next few months the paper record is silent, but on March 3, 1982 Cerling sent Dale a memorandum (Dale Dep. Ex. 9) assessing Dale's performance since November. It began:

> I would like to say that I have seen some improvement, but I have not.

Then the memorandum listed a number of criticisms related to Dale's management of the telephone system and of the Purchasing Department. Some of the problems had been mentioned in prior memoranda but had yet to be dealt with to Cerling's satisfaction: plans for dealing with night calls had not yet been implemented; a timetable for improving recordkeeping in the Purchasing Department still had to be delivered to Cerling; and a plan for course and seminar attendance designed to enhance the professional skills of the Purchasing Department staff apparently had yet to be developed. In addition the March 3 memorandum pointed to several new examples of Dale's poor management skills, including problems in budgeting for the telephone system, failure to take account of the complexity of moving from one segment of the new telephone system to another or of the fact the new system would not accommodate message unit billing by telephone, failure to obtain a formal contract with warranties or guaranties covering the telephone system, and payment of the total amount due for a portion of the telephone system before it was fully operational (rather than withholding the normal 10% pending acceptable performance). Once again Dale's *deposition testimony acknowledged the existence of most of the problems identified in the March 3 memorandum, though in several instances he ascribed the difficulties not to his own mismanagement but to inconsistent information from, or delay by, others in the Tribune organization*

(Dale Dep. III-535). Dale concluded (Dale Dep. III-36-37):

> [Cerling] really said here are the points that I think you should review. And I had gone over them with him point by point.
>
> He obviously wasn't satisfied. I obviously did not realize or I didn't see where I was not performing, because I tried to answer his questions, and had supplied him with information showing that I was trying to comply with what he was doing or what he requested.

Slightly over a month after the March 3 memorandum, Dale was called into Brumback's office and told his employment was to be terminated because he was unable to function efficiently as Purchasing Manager. He was given the option of accepting termination with severance pay or remaining on the payroll until his 55th birthday in July, when he would become eligible for early retirement. Dale elected the latter.

ADEA Claim

As plaintiff in an age discrimination lawsuit, Dale bears the ultimate burden of proving age was a "determining factor" in his discharge--that "but for the employee's age he would not have been fired" *(Matthews v. Allis-Chalmers,* No. 84-2692, slip op. at 3 (7th Cir. Aug. 5, 1985)), or (expressing the same concept) "that he would not have been discharged 'but for' his employer's motive to discriminate against him because of his age" *LaMontagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1409 (7th Cir. 1984)). As *LaMontagne* went on to explain (*id.*) (footnotes omitted):

> By far the more common method of proof, however, is that set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). This indirect proof, as elaborated and clarified in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), requires the plaintiff first to prove a prima facie case of discrimination, by showing (1) that he was in the

> protected class, (2) that he was doing his job well enough to meet his employer's legitimate expectations, (3) that in spite of his performance he was discharged, and (4) that the employer sought a replacement for him. *Huhn v. Koehring,* 718 F.2d 239, 243 (7th Cir. 1983); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1013 (1st Cir. 1979). Success gives rise to a rebuttable presumption of discrimination, and the burden then falls on the defendant to articulate lawful reasons for the discharge. The defendant's burden is only one of production; the burden of persuasion rests at all times on the plaintiff. If the defendant articulates lawful reasons, the presumption is dissolved, and the burden falls on the plaintiff to prove that the proffered reasons are a pretext, by showing either that a discriminatory reason more likely motivated the employer or that the employer's proffered explanation is unworthy of credence. *See Burdine,* 450 U.S. at 253-56, 101 S.Ct. at 1093-95.

Tribune contends:

1. Dale fails to establish a prima facie case of age discrimination, because he cannot show he was meeting Tribune's legitimate performance expectations.

2. Even if Dale has made out a prima facie case, Tribune has articulated a legitimate, nondiscriminatory reason for its actions, and Dale has offered no evidence indicating that reason is pretextual.

Of course Tribune's first argument, on its Rule 56 *motion*, must be understood not in terms of what Dale must "show," *but rather in terms of whether he has shown a genuine issue of fact.* But even from that perspective Tribune's assertion has substantial force. As Tribune contends and Dale acknowledges, neither Cerling nor Brumback was satisfied with Dale's performance as Purchasing Manager. That dissatisfaction was based in large part on what Cerling and Brumback perceived to be Dale's inadequate handling of particular assignments, as expressed in the late 1981 and early 1982 memoranda.

Both managers also reflected the view that Dale was not adapting himself to the new management philosophy Brumback sought to introduce to the Tribune. On that score, a management review performed by *New York* consulting firm Organization Research Counselors, Inc. ("ORC" in August 1981 had identified several problems with Tribune's existing approach to management (Tribune Doc. 2 at 2), including such items as:

> Departments have tended to operate like "fiefdoms."
>
> * * *
>
> A key problem at the department-head level is a lack of cohesiveness regarding organizational skills and little meaningful interaction on management issues.
>
> "Politeness" and submissive/passive obedience at any level are dysfunctional to achieving significant business objectives.

In the course of its survey of Tribune's individual departments, the same report later said (*id.* at 18):

> Purchasing employees perceive themselves as "order takers."
>
> To the extent that many of Cerling's criticisms of Dale state his failure to anticipate problems and to head them off before they arose, as well *as his failure to initiate procedures and systems designed to enhance efficiency and profitability*--the foremost goals of the new management philosophy *id.* at 2)--they bespeak major doubts (by both Cerling and Brumback) as to Dale's ability *to* perform within the emerging Tribune environment. Indeed, Dale himself acknowledges as much in the deposition testimony quoted earlier in this opinion (Dale Dep. I-96) and in the August 31, 1981 letter to Lifvendahl.
>
> Dale attempts to call into question all that evidence of his not meeting his employer's legitimate expectations by arguing that he was truly performing adequately. And--at least with inferences drawn in Dale's favor--there may in

> fact be lingering questions as to whether some of the specific criticisms made by Cerling were entirely warranted. But on the record before this Court, there can be no question either (1) that Cerling and Brumback were dissatisfied with Dale's performance or (2) that their dissatisfaction had its roots in their view of the kind of job a Purchasing Manager should be doing. On that evidence--even with all the reasonable inferences running in Dale's favor--there is no basis for concluding age was a determining factor in his termination. As *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1223 (7th Cir. 1980) teaches (in the District Court opinion adopted per curiam) (citations omitted):
>
> [ADEA] . . . was not *intended* as a vehicle for judicial review of business decisions . . . . the question before the court is not whether the company's methods were sound, or whether its dismissal of Kephart was an error of business judgment. The question is whether he was discriminated against *because* of his age. Although an employer may not make *unreasonable expectations*, and must make the employee aware of just what his expectations are, beyond that the *court will* not inquire into the defendant's method of conducting its business.

By the same token, the fact that in the eyes of an objective observer an employer may have misjudged the quality of a discharged employee's work does not itself give rise to an inference of discrimination--that is, in the absence of evidence indicating age was a basis for the employer's conduct. *Huhn v. Koehring Co.*, 718 F.2d 239, 242-43 (7th Cir. 1983); see also *Burdine*, 450 U.S. at 259.

In short, no *facts* (as contrasted with Dale's own self-evaluation) appear to warrant the conclusion Dale was really meeting the legitimate expectations of his employer--the prerequisite to a prima facie showing of age discrimination. Nevertheless, out of an abundance of caution, this Court will give Dale the benefit of the doubt at the first (prima facie) step of the three-stage *Burdine*

approach. This opinion therefore goes on to assess the strength of Dale's case in summary judgment terms at the last stage of the analysis, where the question becomes whether Tribune's stated nondiscriminatory reason for Dale's termination--his inefficiency and ineffectiveness as a manager--was merely a pretext for age discrimination.

Normally a plaintiff establishes an employer's nondiscriminatory reason is unworthy of credence by pointing to direct evidence of age discrimination. Because Dale acknowledges he has no such direct evidence, *he must offer evidence giving rise to an inference that Tribune had a discriminatory motive in terminating him.* See *LaMontagne,* 750 F.2d at 1414-15. In that regard this Court "is not required to evaluate every *conceivable* inference which can be drawn from evidentiary matter, but only reasonable ones." *Matthews,* slip op. at 5, quoting *Parker v. Federal National Mortgage Association,* 741 F.2d 975, 980 (7th Cir. 1984) (emphasis in original), which affirmed this Court's grant of an employer's summary judgment motion in a like ADEA case, 567 F.Supp. 265 (N.D. Ill. 1983).

Apart from his own subjective belief he was the victim of age discrimination--an insufficient basis for finding pretext in the context of a summary judgment motion, see *Elliot v. Group Medical & Surgical Service,* 714 F.2d 556, 564 (5th Cir. 1983)--Dale points to the fact a number of other older workers also left Tribune at or around the time of his discharge. Dale claims that pattern of departures raises an inference of age discrimination.

In inference terms, though, that really represents a quantum leap. It ignores--skips directly over--the most reasonable inference to be drawn from the departures. As the ORC report demonstrates and as Dale acknowledges, *Brumback sought to refashion the management of Tribune by placing new emphasis on profitability, planning and interaction among departments* (Tribune Doc 2 at 2-3).

ORC found a major obstacle in Tribune's existing management culture, in which departments operated as *fiefdoms* and managers themselves tended to be passive, awaiting instructions from top management (Tribune Doc. 2 at 2). It would scarcely be surprising if the discriminated employees least adaptable to such a change turned out to include a number in the later stages of their careers. And a number of those managers might well choose to leave voluntarily rather than contend with the announced--and of course legitimate--change of direction. Others might opt to remain but still prove incapable of adhering to the new management plan, in which event their termination or early retirement would properly be perceived as necessary to the overall success of the undertaking. In sum, it is not at all surprising that the toll of such a reorganization should be heaviest among longer-term (and thus older) employees--without connoting any ADEA-forbidden motivation.

In light of that far more reasonable inference from the employee departures Dale points to--an inference that fits all the evidence before this Court--Dale's mere assertion of age discrimination as a possible explanation for the departures does not suffice to meet his evidentiary burden under Rule 56(e). Absent any specific evidence to indicate employees were selected for termination because of their ages, rather than because of their performance or their adaptability to the new management philosophy, there is simply no rational basis for imputing a discriminatory motive to Tribune.

Huhn, 718 F.2d at 242-43 quoted the District Court's recapitulation of the reasons supporting summary judgment in the employer's favor after making the third-step pretext analysis. Its language (adapted solely by substituting Dale's name for Huhn's) could well have been written for this case:

> Whether or not [Dale] raises an issue of material fact as to just how good or bad his performance

> would look to an outside observer, the company was not satisfied. . . .
>
> The issue here is not whether [Dale] was performing satisfactorily. The company did not think that he was. So long as age was not the basis of the company's decision--and absolutely no evidence exists in this record that it was--the company can make a decision to terminate, even if the decision is unwise. The only thing it cannot do for purposes of this lawsuit is discriminate on the basis of age.
>
> [Dale] is arguing that because to him the company's decision did not make sense, he is the victim of age discrimination. A plaintiff claiming age discrimination has a larger burden. He must affirmatively show that "but for" his age, he would not have been fired. [Dale] has not met his burden.

ERISA and Duty-of-Fair-Dealing Claims

During the course of his deposition Dale said Tribune's overall employee pension obligation would be most substantially reduced by the termination or early retirement of long-term employees. Thus he speculated the prospect of such cost reductions may have motivated Tribune's termination of older employees around the time of his own termination. Accordingly Complaint Count II asserts claims under ERISA §§502 and 510, 29 U.S.C. §1132 and 1140.[2]

But as Tribune correctly points out, no claimant may

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[2] ERISA §510 provides in relevant part:

> It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of any employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act,

(Footnote continued on the following page)

bring suit under ERISA without first exhausting all administrative claim-resolution procedures required by the statute. *Kross v. Western Electric Co.*, 701 F.2d 1238, 1244-45 (7th Cir. 1983) (quoting *Amato v. Bernard*, 618 F.2d 557, 567-68 (9th Cir. 1980)). Tribune Personnel Manager Robert Musil's Aff. ¶6 states Dale did not resort to those remedies before filing the Complaint:

> Each benefit and/or pension plan of the Chicago Tribune has an internal dispute resolution mechanism as required by law whereby eligible or covered employees may protest or seek review of payments made or denied to them under the plans. At no time, either during his tenure with the Chicago Tribune or thereafter, did Charles Dale ever internally protest, seek review of, or challenge in any way any benefit payment made or denied him under any Tribune benefit or pension plan.

Dale has offered no contrary evidence. In fact, he has not even argued the ERISA issue in his memorandum

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(Continued from previous page)

> or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.

ERISA §502 provides in relevant part:
(a) A civil action may be brought--
(1) by a participant or beneficiary--

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

opposing Tribune's motion. No predicate exists for denying Tribune's Rule 56 motion as to Dale's ERISA-based claim.

That is equally true of the common-law duty-of-fair-dealing claim advanced in Complaint Count III. As Tribune Mem. 23 says, Dale was an employee at will, dischargeable for any reason or for no reason at all. Dale offers no evidence to refute that characterization, though he argued the Tribune's policies and benefit packages created a duty of fair dealing that was breached by his termination. But absent a breach of Tribune's contractual obligations to Dale- - -something Dale has not asserted- -Illinois law does not recognize an action for breach of an implied covenant of fair dealing. As *Martin v. Federal Life Insurance Co.*, 109 Ill.App.3d 596, 605-07, 440 N.E.2d 998, 1005-06 (1st Dist. 1982) teaches:

> Various authorities have discussed the general principle that contracting parties have a good faith and fair dealing covenant implicit in their agreements; however, according to our understanding of the principle, it is essentially used as a construction aid in determining the parties' intent. Hence, in *Martindell v. Lake Shore National Bank* (1958), 15 Ill.2d 272, 286, 154 N.E.2d 683, the supreme court stated, "Every contract implies good faith and fair dealing between the parties to it, and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted. (I.L.P., Contracts, §217.)"
>
> * * *
>
> While we agree that the same conduct may give rise to both tort and contract theories of recovery in some cases, we do not believe that Illinois law recognizes a tort remedy based on an employer's "bad faith" breach of an implied contract covenant of fair dealing.
>
> * * *
>
> Care must be taken to prevent the transmutation of every breach of contract into an indepen-

dent tort action through the bootstrapping of the general contract principle of good faith and fair dealing. We conclude that existing principles of tort law are adequate without our creating a new action based on a vague notion of fair dealing.

Once again, Dale has made no effort to raise a factual question with respect to Tribune's alleged breach or otherwise to refute Tribune's argument in support of its motion. Summary judgment must be granted on the Illinois common-law claim as well.

Motion To Add Party Plaintiff

Because the granting of Tribune's summary judgment motion compels dismissal of this action, Dale's motion to add a named party plaintiff is moot. Of course John Hanneman, the individual seeking to join, is free to pursue his claims against Tribune in a separate action.

Conclusion

There is no genuine issue of material fact as to any of the claims set out in Dale's Complaint, and Tribune is entitled to a judgment as a matter of law. This action is therefore dismissed with prejudice. Dale's motion to add a named party plaintiff is dismissed as moot.

Milton I. Shadur
United States District Judge

Date: August 16, 1985

APPENDIX C

U.S. Court of Appeals
Seventh Circuit — Docket

Title:

CHARLES DALE,
Plaintiff-Appellant,

vs.

CHICAGO TRIBUNE COMPANY,
Defendant-Appellee.

Misc. No. AIMS	General No. 85-2577
☒ Pvt. Civil	
District N. IL., E. Div.	Filed in D.C. 04-10-84
Number 84 C 3100	Notice of Appeal 09-12-85
Judge Milton I. Shadur	Nature of Suit 3442

Summary Of Events

Docketed: 09-16-85 Paid ☒	Briefs Distributed:
Appellant's Brief: 10-28-85	Mar 17, 1986
Separate Appendix: 10-28-85	Oral Argument: 4-16-86
Appellee's Brief: 12-6-85	Panel:
Reply Brief: 1-3-86	WOOD COFFEY NOLAND
Additional Authority: 1-23-86	Opinion Date:
Notice of Oral Arg: 3-4-86	7-28-86 NOLAND
	Disposition: AFFIRMED
	Pet. for Rehearing:
	9-5-86; 10c appdx. Per Order
	10-6-86 Denied ☒
	Mandate Issued: 10-14-86
	Rec. Ret: 10-14-86

Short Record Filed 09-16-85
Original Record Filed 10-3-85
Pleadings: 1 volumes.
Depositions: 3 volumes.

Supplemental Records

Date	Contents
10-25-85	lv trans
12-12-85	2 env. IN CAMERA

Record Withdrawal	Date	By Whom	Returned
1v pldg 3v deps	10-23-5	Patner	10-25-85
1v pldgs. 1v trans. 3v depo. 1v pldgs lv trans	12/27/5	Hemphill	1-3-86
3v deps. 2env. 1 tape	4-17-86	LC	6-30-86
1v pldgs lv trans 3v deps	8-21-86	Patner	9-4-86